

IN THE SUPREME COURT OF THE STATE OF DELAWARE

TONY L. MATTHEWS,	§	
	§	No. 306, 2008
Plaintiff Below,	§	
Appellant,	§	Court Below: Superior Court of
	§	the State of Delaware in and for
v.	§	New Castle County
	§	
FOOD LION, L.L.C.,	§	C. A. No. 04C-09-219
	§	
Defendant Below,	§	
Appellee.	§	

Submitted: February 4, 2009

Decided: March 24, 2009

Before **STEELE**, Chief Justice, **BERGER** and **JACOBS**, Justices.

**ORDER**

This 24<sup>th</sup> day of March 2009, upon consideration of the briefs of the parties and the record in this case, it appears to the Court that:

1. Tony Matthews, the plaintiff below, appeals from a Superior Court order granting summary judgment to the defendant, Food Lion, L.L.C. (“Food Lion” or the “company”), in this action for negligent supervision and retention of an employee. On appeal, Matthews argues that the Superior Court erroneously granted Food Lion summary judgment, because: (i) the negligent actions of Food Lion’s employee were foreseeable, and (ii) the “exclusivity rule” of the Workers’ Compensation statute does not bar Matthews from recovery. We find no error and affirm.

2. On September 24, 2002, Matthews, a bagger at the Milford, Delaware Food Lion, and Pamela Booth, the night manager at that store, were involved in an accident in the store's parking lot.<sup>1</sup> The store closed at midnight and the two were socializing in the store's parking lot after their shifts had ended. What happened next is unclear, but about ten minutes later Matthews was riding on the hood of a car that Booth was driving around the parking lot. Matthews fell off and sustained permanent injuries to his neck, brain, head, shoulders, back and legs. Because of a memory loss resulting from that accident, Matthews cannot recall the events that led to his injuries. There was no evidence that Matthews had consumed any alcohol.

3. On September 24, 2004, Matthews sued Booth for negligence,<sup>2</sup> and Food Lion for negligent supervision and retention. In his pleadings, Matthews alleged that Booth engaged in a pattern of irresponsible behavior involving young workers at the Milford Food Lion store. Specifically, once or twice a week after the store closed, over an eight-month period, Booth, and some underage Food Lion employees drank alcohol and engaged in horseplay in the Food Lion parking lot.<sup>3</sup>

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<sup>1</sup> The facts are taken primarily from the Superior Court's order granting Food Lion summary judgment. *See Matthews v. Booth, et. al.*, 2008 WL 2154391 (Del. Super. Ct. May 22, 2008).

<sup>2</sup> Booth is not a party to this appeal.

<sup>3</sup> Matthews alleges that he and other young employees engaged in many "pranks" during these after-work events. The only prank pled with any specificity is that Matthews and his co-workers would surround cars in the parking lot with shopping carts.

Matthews also alleged that Booth was involved in a sexual relationship with Christopher Rust, another young Food Lion employee. At the time of the accident, Matthews and Booth were 18 and 31 years of age, respectively. Matthews claims that the company either had, or should have had, notice of Booth's dangerous propensities, because other managers at the Milford Food Lion observed that after the store closed, Booth and young employees would socialize in the store parking lot, and the morning after, bottles of alcohol would be found in the garbage cans in that lot.

4. Matthews' claim against Booth and the company relies on Food Lion's corporate policies. The company prohibits dating between management and associates in the same store, and in such circumstances requires a transfer of one of the dating employees to another location. The company also prohibits employees from consuming alcohol at the workplace, or loitering, on Food Lion property after their shifts are over.

5. On December 13, 2006, Food Lion moved for summary judgment. The Superior Court denied that motion, holding that the record was insufficiently developed to conclude that there was no material issue of fact. On July 9, 2007, at the final pre-trial conference, Matthews' counsel conceded that there was no record evidence that Food Lion had actual knowledge of Booth's inappropriate conduct. The Superior Court requested Matthews' counsel to submit a written inventory of

all record evidence showing that Food Lion should have known about Booth's conduct.

6. On July 18, 2007, after receiving Matthews' written inventory of the record evidence bearing on Food Lion's knowledge of Booth's conduct, the Superior Court, *sua sponte*, decided to reconsider Food Lion's motion for summary judgment. The trial court requested further briefing on the applicability of this Court's recent decision in *Grabowski v. Mangler*.<sup>4</sup> While waiting for the parties' briefs the Superior Court, on July 25, issued a letter opinion: (i) denying Booth's motion to bifurcate the trial, and (ii) granting Booth's and Food Lion's motions *in limine* to bar the use of terms such as "seduced," or "predator" and excluding (except where Matthews could show its relevance) any reference to Booth having engaged in sexual relations and drinking with her co-workers. After considering the parties' supplemental briefs, the Superior Court granted Food Lion summary judgment on May 22, 2008. Matthews appeals from that order.

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<sup>4</sup> 938 A.2d 637 (Del. 2007).

7. The Superior Court granted Food Lion summary judgment on Matthews' negligent supervision claim,<sup>5</sup> on the ground that the company owed no duty to Matthews. The Superior Court reasoned that even if Food Lion had constructive knowledge of Booth's inappropriate behavior, Matthews' injuries were not a foreseeable result. The court also rejected Matthews' argument that Food Lion owed him a heightened duty of care because he was an employee, holding that that claim was precluded by the "exclusivity rule" of the Workers' Compensation statute.<sup>6</sup>

8. On appeal, Matthews claims that: (i) there was sufficient evidence of record to infer that his injuries were foreseeable to Food Lion, and (ii) the exclusivity rule does not apply, because there was no nexus between Booth's actions and her work as a Food Lion employee.

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<sup>5</sup> The Superior Court described negligent supervision as:

[B]ased upon the employer's negligence in failing to exercise due care to protect third parties from the foreseeable tortious act of an employee. An employer is liable for negligent hiring or supervision where the employer is negligent in giving improper or ambiguous orders or in failing to make proper regulations, or in the employment of improper persons, thus creating an unreasonable risk of harm to others.... The deciding factor is whether the employer had or should have had knowledge of the necessity to exercise control over its employee. Thus, existence of duty under a negligent supervision theory depends upon whether the risk of harm from the dangerous employee was reasonably foreseeable as a result of the employment.

Neither party disputes that statement of the law.

<sup>6</sup> 19 *Del. C.* § 2304.

9. Food Lion responds that: (i) if Matthews' injury occurred in the course and scope of his work, then the Workers' Compensation exclusivity rule bars his claim; and (ii) even if the exclusivity rule is inapplicable, an employee is barred from bringing a negligent supervision claim against his employer. Food Lion further contends that Matthews cannot prove essential elements of his claim, because: (iii) the facts Matthews relies upon were ruled inadmissible and that ruling was not appealed; (iv) Matthews cannot prove that Food Lion had actual or constructive knowledge of Booth's conduct; and (v) even if Matthews can prove constructive knowledge, his injury was unforeseeable.

10. Only two legally significant issues emerge from these contentions. The first is whether Matthews may bring a claim of negligent supervision against Food Lion. That issue subdivides into two parts: (a) does the exclusivity rule of the Workers' Compensation statute bar Matthews' claim in whole or part, and (b) are employees permitted to sue their employers for negligent supervision? The second issue is whether the Superior Court erroneously held that Matthews' injuries were unforeseeable, and that therefore, Food Lion owed him no duty of care. Both are issues of law that we review *de novo*.<sup>7</sup>

11. In ruling on the first issue—whether Matthews' claim was barred—the Superior Court rejected Matthews' claim that Food Lion owed him a heightened

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<sup>7</sup> *LeVan v. Independence Mall, Inc.*, 940 A.2d 929, 932 (Del. 2007).

duty of care as a young employee under Booth's supervision.<sup>8</sup> The trial court held that any claim of breach of a heightened duty of care would be preempted by the "exclusivity rule" of the Workers' Compensation statute, which provides:

Every employer and employee, adult and minor, except as expressly excluded in this chapter, shall be bound by this chapter respectively to pay and to accept compensation for personal injury or death by accident arising out of and in the course of employment, regardless of the question of negligence and to the exclusion of all other rights and remedies.<sup>9</sup>

The Superior Court held that Matthews relied on his employment status to establish a heightened duty of care, and that any such heightened duty necessarily arose in the course of employment. Because Matthews based his negligent supervision claim on a heightened duty, the claim was barred by the exclusivity rule. The Superior Court did, however, specifically reject Food Lion's argument that an employee is absolutely barred from suing an employer for negligence under any circumstance.

12. On appeal Matthews argues that the Workers' Compensation statute does not bar his claim, because his status as an employee is only incidental to his negligent supervision claim. Matthews contends that he was injured outside the scope of his employment; therefore, his status as a Food Lion employee is

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<sup>8</sup> *Matthews v. Booth, et. al.*, 2008 WL 2154391, at \*4 (Del. Super. Ct. May 22, 2008).

<sup>9</sup> 19 Del. C. § 2304.

irrelevant to his claim that Food Lion negligently supervised Booth. Matthews also argues that he is not claiming that Food Lion owed him a heightened duty of care, but rather, that Food Lion “should have had a heightened awareness of the possibility of risky behavior....” Food Lion replies that if it owed Matthews a duty because of his status as an employee, then the exclusivity rule would bar a suit against the company; and that in any event, an employee may not bring a negligent supervision claim against his employer.

13. The question of whether the exclusivity rule operates to bar Matthews’ claim is not properly before this Court. On appeal, Matthews contends that he never argued that Food Lion owed him a heightened duty of care. Moreover, the trial court’s determination that the exclusivity rule barred any claim of a heightened duty is immaterial,<sup>10</sup> because the Superior Court decided the merits of Matthews’ claim in determining that his injuries occurred outside the scope of his employment. Injuries that occur outside the scope of employment are not governed by the Workers’ Compensation statute.<sup>11</sup> Food Lion’s claim that the exclusivity rule operates as a bar here is procedurally defective, because Food Lion

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<sup>10</sup> Although Matthews clarifies the substance of his claim on appeal, his pleadings below were unclear, and the Superior Court’s interpretation of Matthews’ argument was reasonable.

<sup>11</sup> See 19 *Del. C.* § 2304 (limiting Workers’ Compensation to injuries resulting from “accident[s] arising out of and in the course of employment.”).



did not cross-appeal from the Superior Court's ruling that Matthews' injuries occurred outside the scope of his employment.

14. The second question—whether an employee is categorically barred from suing his employer for negligent supervision—is also not properly before this Court. The Superior Court specifically rejected Food Lion's contention that employees may not sue their employers for negligence. Because Food Lion did not cross-appeal from that ruling, we need not address that ruling either.

15. In deciding the second issue—whether Matthews' injuries were foreseeable—the Superior Court granted Food Lion summary judgment, because Booth's improper social conduct did not make Matthews' injuries a foreseeable risk. Although the Superior Court had issued a ruling *in limine* that barred reference to Booth engaging in sexual relations and drinking with her co-workers, the court appeared to consider those facts when granting Food Lion summary judgment. The Superior Court stated: “[t]here is simply no causal connection between a social or personal relationship and injuries sustained while riding on the hood of a car. Therefore, Booth's alleged propensity to engage in personal or inappropriate relationships with younger co-workers is not sufficient to establish [Matthews'] claim for negligent supervision.”<sup>12</sup>

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<sup>12</sup> 2008 WL 2154391, at \*3.

16. Matthews claims on appeal that (i) Booth's pattern of inappropriate behavior should have put Food Lion on notice of her propensity to engage in risky behavior in violation of the company's policies; and (ii) the significant time frame during which Booth engaged in misconduct should have made the risk of harm to Matthews foreseeable to the company. Food Lion responds that the evidence does not show that Matthews' injuries were a foreseeable consequence of Booth's inappropriate behavior.

17. The issue framed by these contentions is whether Matthews' injuries were a reasonably foreseeable consequence of Booth's inappropriate behavior. We review a trial court's grant of summary judgment *de novo*, to determine "that there is no genuine, material issue of fact and the moving party is entitled to judgment as a matter of law."<sup>13</sup>

18. Matthews relies on two cases to establish that his injuries were reasonably foreseeable: *Jones v. Delaware Community Corporation for Individual Dignities*,<sup>14</sup> and *Doe v. DeSoto Parish School Board*.<sup>15</sup> Neither case is apposite.

19. The *Jones* decision does not discuss foreseeability or disclose any facts of that case. Accordingly, Matthews' conclusory claim that *Jones* mandates a

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<sup>13</sup> *Berns v. Doan*, 961 A.2d 506, 510 (Del. 2008) (citing *Williams v. Geier*, 671 A.2d 1368, 1375 (Del. 1996)).

<sup>14</sup> 2004 WL 2827924 (Del. Super. Ct. April 29, 2004), *aff'd* 871 A.2d 1127 (Table) (Del. 2005).

<sup>15</sup> 907 So.2d 275 (La. App. 2005).

ruling that his injuries were foreseeable is unhelpful. Moreover, *Jones* is procedurally distinguishable, because it arose on a motion for a new trial after the jury had already found the defendant liable.<sup>16</sup>

20. *DeSoto Parish* is factually distinguishable. In *DeSoto Parish* there was sexual contact between a girl and five boys on a school bus, after a trip to a high school basketball game.<sup>17</sup> Contrary to school policy, the team coaches did not separate the male and female students, nor did the coaches sit in the center of the bus.<sup>18</sup> That policy was adopted because of past incidents of improper sexual contact between students on previous athletic trips.<sup>19</sup> The court reasoned that those past incidents of improper sexual contact made it foreseeable that if the coaches did not follow school policies, students would continue to have improper sexual contact on athletic trips.<sup>20</sup> The past misconduct in *DeSoto Parish* was of the same kind as the later incident held to be foreseeable. That is not the case here.

21. Here, Matthews claims that Booth's engaging in sexual behavior with employees under her supervision and drinking with them, foreseeably led to Matthews riding on the hood of Booth's car and severely injuring himself. Unlike

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<sup>16</sup> 2004 WL 2827924, at \*1.

<sup>17</sup> *DeSoto Parish*, 907 So.2d at 278.

<sup>18</sup> *Id.* at 281.

<sup>19</sup> *Id.* at 282.

<sup>20</sup> *Id.* at 283.

*DeSoto Parish*, that behavior was not of the same general nature as the incident that caused Matthews' injuries. A harmless prank, like surrounding a car with shopping carts, does not make riding on the hood of a moving car a foreseeable risk. Nor does the fact that Booth provided underage employees with alcohol make Matthews' injuries foreseeable, because Matthews has not shown that any alcohol was consumed on the night of the accident. Because there was no evidentiary basis to infer that Matthews' injuries were a foreseeable result of Booth's conduct, the Superior Court properly ruled that Matthews had failed to establish that Food Lion owed him a duty.

22. For the above reasons, Matthews has not established any entitlement to relief on this appeal.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is **AFFIRMED**.

BY THE COURT:

/s/ Jack B. Jacobs  
Justice